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Railway strike: What invoking s. 107 of Labour Code means to labour law | Frank Portman

By **Frank Portman**

Law360 Canada (August 28, 2024, 10:28 AM EDT) -- The recent labour actions at Canadian Pacific Kansas City (CPKC) and Canadian National Railway (CN) have garnered significant media attention — as they should. Railways are an oft-overlooked keystone to Canada's economy. Given the heavy resource focus of Canada's wealth, railways form the primary way such goods are brought to market. Labour strife in this area poses a serious risk to Canada's economic well-being.

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As a result, the movement of labour unions at Canada's two largest railroads into strike positions has caused great consternation when, effective Friday, Aug. 23, labour at both railroads stopped.

It is within this context that the minister of Labour invoked its relatively unused powers under s. 107 of the *Canada Labour Code.*

Those powers permit the minister to direct the Canada Industrial Relations Board to "do such things as the Minister deems necessary" to maintain or secure industrial peace or promote conditions favourable to the settlement of labour disputes. In this case, that direction was to conduct a binding arbitration. This would result in a neutral party resolving each of the areas of dispute, and imposing a final, binding contract on both parties.

This ended the ability of the unions to legally strike, and the employers to legally lockout, and exposed any party who engaged in a resulting illegal labour stoppage to the potential for massive penalties.

While it is troubling that negotiations seem to have reached an impasse, it is not necessarily surprising given the points of contention between the parties.

One of the key elements of negotiations has been health and safety. This can be a difficult matter. Unlike pay, negotiating health and safety matters is difficult and affects not only railway employees but also the public at large when there is a railway disaster.

This also makes it awkward for the rights arbitration process to which the parties have been subject. Rights arbitration generally results in middle-of-the-road outcomes, where each party gets some part of what they want, but not all. This is straightforward for monetary items such as wages or pensions. It gets much trickier when dealing with more black-and-white positions, such as appropriate and necessary safety precautions. Skimping on health and safety is a lot like playing Russian roulette — rarely a wise decision.

There can be no doubt that both sides make important points.

On the one hand, the logistics involved in maintaining a rail network over a country as vast and sparsely populated as Canada means that costs and efficiencies must be maintained, particularly given the need for Canadian producers to be able to access the rails at reasonable shipping rates.

On the other hand, remembering the disasters in Hinton, Lac-Mégantic or Mississauga will underscore for anyone the need for proper health and safety measures.

As with all things, the question of where the right balance lies can be subjective, but is of the utmost importance to all involved.

What will also be interesting is legally, what will come of the minister's decision to use s. 107 of the *Canada Labour Code* to force the parties into binding arbitration. This is widely seen as a pro-management decision as it takes the single most powerful tool in the Union's arsenal — a strike — off the table. The minister justified the action given the overwhelming importance of the railway network to the Canadian economy.

This is particularly true immediately as the labour strife falls in the middle of the western provinces' agricultural harvest. Railways are essential to the transportation of crops that need to get to markets: wheat, barley, canola, lentils and soybeans.

The unions impacted by the referral have vowed to appeal the decision, although they have indicated that until such time as a court might overturn the decision, they will comply by returning to work.

The question will be whether these pressing economic circumstances and the availability of binding arbitration, are sufficient to justify the elimination of the unions' opportunity to strike.

Government intervention in labour disputes is not a new phenomenon. However, it changed markedly in 2015.

Since 2015, when the Supreme Court of Canada first held that the ability of a union to strike can enjoy the protection of the *Charter of Rights and Freedoms* under its right to freedom of assembly, unilateral "return to work" actions have been subject to greater scrutiny. This is the climate under which the minister's actions will be reviewed.

This will undoubtedly be a central pillar of the Unions' promised appeal. Given the rarity of the invocation of s. 107, as well as the stakes involved, the promised appeal will give us some fascinating insight into the limits on government intervention in labour disputes, even high-profile ones of national concern.

It is likely that the appeals of this decision will mark an important development in how and when governments can intervene in labour relations matters.

Frank Portman is an employment lawyer at Massey LLP. His specialty is executive employment law where he assists presidents, vice-presidents and other C-level executives and the organization seeking to hire their talents, to complete the deal through effective executive employment contracts.

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